No. 94-1112

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In The
# SUPREME COURT OF THE UNITED STATES

October Term, 1994

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**ROBERT WORKMAN,**

**Petitioner,**

**v.**

**SHERIFF ED JORDAN, in his individual capacity, and UNDERSHERIFF RICK DILL, in his individual capacity,**

**Respondents.**

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## REPLY TO BRIEF IN OPPOSITION

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March 1995

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## REPLY TO BRIEF IN OPPOSITION

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution , 42 U.S.C. § 1983, and Colo. Rev. Stat. §§ 24-10-106(1); 24-50.5-101, -102, -103 are cited herein. *See* App. "B" for the text of these amendments and statutes.

## RESPONSE TO ARGUMENTS FIRST RAISED IN BRIEF IN OPPOSITION

Initially, Petitioners wish to correct a misstatement in the Statement of Facts from Respondents' brief in opposition to the petition for a

writ of certiorari. In the middle of page 2 thereof, Respondents state that "the investigator" made certain factual findings with respect to the sexual harassment charges against Workman. Respondents then list ten findings allegedly made by the investigator.

In actuality, those "findings of fact" were made by two Weld County employees, Pat Persichino (Weld County Director of Personnel) and David Worden (the Acting Director of Personnel) "from the information obtained from [the investigator]." Aplt. App. 1 at 43. Thus, since the "findings" were made by two Weld County employees who cooperated closely with Respondents Sheriff Ed Jordan and Undersheriff Rick Dill throughout Weld County's biased investigation of the sexual harassment charges against Workman, the validity of the findings is very questionable.

Furthermore, the "finding" in Persichino's and Worden's November 7, 1989 memo of "unwelcome touches at the Sheriff's Office" is ambiguous in multiple respects. *See* Aplt. App. 1 at 43. For example, it only implies, but does not state, that Workman was responsible for the unwelcome touches. Thus, it leaves open the possibility that someone else engaged in the touching. Second, the memo does not indicate what type of touching occurred, other than pinching one woman on the cheek. Thus, the touching could have involved pats on the shoulder or something similar. By no means was there ever any evidence Workman touched any female employee in a sexual manner. In fact, the hearing officer specifically found that such conduct

did not occur. Aplt. App. 1 at 50 (App. "A", *infra* 3a-4a.)

It should also be pointed out that, contrary to Respondents' assertion on page 23 of the brief in opposition, the hearing officer made no finding that the sexual harassment allegations against Petitioner were grounded in fact. *See* Aplt. App. 1 at 48-54 (App. "A", *infra* 1a - 8a). Finally, Workman's complaint does not implicitly concede that the misconduct with which he was charged actually occurred. Because the hearing officer had already concluded there was no evidentiary basis for the sexual harassment charge, Workman's federal court complaint did not address that issue. Rather, the complaint dealt with Respondents' misconduct in violating Workman's constitutional and state law rights.

On a second issue, Respondents argue on pages 19-20 of the brief in opposition that it is unnecessary for this Court to provide First Amendment protection for government employees who provide sworn, truthful testimony on the basis that there are allegedly various state law protections available to persons such as the Petitioner. However, there are a number of fallacies in this argument.

As Respondents are well aware, Colo. Rev. Stat. § 24-50.5-101, *et seq.* (the state "whistle-blower" statutes) (App. "B", *infra* 11a-13a) are not available to Workman. Those statutes provide protection from employer retaliation only for persons employed by a state agency. *See* Colo. Rev. Stat. §

24-50.5-102(3). Workman, on the other hand, was employed by a county government. In an attempt to utilize the "whistle-blower" statutes, Petitioner alleged, as a seventh claim for relief, a claim based upon § 24-50.5-103. Respondents moved to dismiss the claim on the ground that Petitioner was not an employee of the state of Colorado (Aplt. App. 2 at 13), and the district court dismissed the claim. Aplt. App. 4. Thus, there is no basis for Respondents to contend that Workman could invoke the state whistle-blower statutes to protect him from their retaliatory conduct in this matter.

Furthermore, the case law established under *Martin Marietta Corp. v. Lorenz*, 823 P. 2d 100 (Colo. 1992) and *Lathrop v. Entenmann's Inc.*, 770 P.2d 1367 (Colo. App. 1989) is probably inapplicable to the instant situation. In Colorado, an employee may generally be terminated at the will of the employer. *Cronk v. Intermountain Rural Elec. Co.*, 765 P.2d 619, 622 (Colo. App. 1988). In *Lorenz*, however, the Colorado Supreme Court established a public policy exception to the state's at-will termination rule. Under *Lorenz*, an employee cannot be terminated where: (a) the employer directs the employee to perform an illegal act as part of his work related duties or prohibits the employee from performing a public duty or exercising an important job right; (b) the action directed by the employee would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy; (c) the employee was terminated for refusing to follow the employer's directive; and (d) the employer knew, or should have

known, that the employee's refusal was based upon his reasonable belief that the order was illegal. *Lorenz*, 823 P.2d at 109.

Here, the public policy exception is probably inapplicable since the Respondents did not direct Petitioner to perform an illegal act or prohibit him from performing a public duty. Additionally, the exception apparently would not apply to the retaliation for Petitioner's speech at his own grievance board hearing because that retaliation consisted of acts other than termination. Moreover, a claim based upon the public policy exception could not be brought against a governmental entity in Colorado on the ground that, as a tort claim, it would be precluded by the Colorado Governmental Immunity Act. *See* Colo. Rev. Stat. § 24-10-106(1) (App. "B", *infra* 9a-11a); *Holland v. Board of County Comm'r*, 833 P.2d 500, 508 (Colo. App. 1994). Thus, the state laws cited by Respondents are of little, if any, value to Workman.

Yet, even if the state laws cited by Respondents had been available to Workman, the Court should nonetheless make it clear that the First Amendment protects government employees providing sworn, truthful testimony from employer retaliation. In the first place, the laws cited by the Respondents would be available only to Colorado residents; whereas all government employees, regardless of their state of residency, should be immune from such employer retaliation. Second, state laws can be repealed or overruled. Third, because testimonial speech is of fundamental importance to our judicial system, it deserves constitutional protection.

Accordingly, the Court should hold that a governmental employee's sworn, truthful testimony at a quasi-judicial, administrative hearing is inherently a matter of public concern subject to the protection of the First Amendment.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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March 1995

# APPENDIX "A"

## WELD COUNTY ADMINISTRATIVE APPEAL

## GRIEVANCE HEARING OF ROBERT WORKMAN BEFORE WELD COUNTY HEARING OFFICER DON J. HOFF

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## FINDINGS OF FACT, CONCLUSIONS AND DECISION

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THIS MATTER, came on for hearing on March 6th, 1989 and was continued from time to time for the taking of testimony and making argument and the hearing was finally concluded and closed by the Hearing Officer on March 23rd, 1989. Sheriff Ed Jordan, appeared in person and by his attorneys Jan Rundus and Bruce T. Barker. The employee, Robert Workman, appeared in person and by his attorney Mark [sic] Colin. Numerous witnesses testified and twenty-six (26) exhibits were marked and admitted into evidence. One exhibit admitted into evidence was not marked, but consisted of a transcript of an interview between Captain Paul Branham and Susan Jarrett. A notebook containing the transcript of interviews between Captain Branham and other employees of the Sheriff's office and also containing numerous other documents was made available to the Hearing Officer by stipulation of the parties.

After hearing the evidence, the statements of counsel and reviewing the exhibits, the Hearing Officer enters the following findings:

A. While Colorado Law generally allows an employer to terminate an employee at will, unless the employee has certain vested rights or contractual rights associated with his employment, the County, and thereby Sheriff Jordan, granted to his employees certain rights to their employment, specifically setting limits on when and how an employee can be terminated and those rights are set forth in Ordinance No. 118-G adopted by the Board of Commissioners, Weld County, Colorado.

B. Ordinance No. 118-G allows the employer to terminate an employee for severe misconduct pursuant to the Dismissal Procedures section on page 15 of the Ordinance. An employee may also be terminated after being convicted of a crime, pursuant to page 21 of the Ordinance. It is clear that both of those terminations may be made without the application of progressive discipline.

C. An employee may be terminated for sexual harassment pursuant to pursuant to [sic] page 13 of the Ordinance. However, it is unclear to the Hearing Officer, whether such termination must be preceded by progressive discipline. Any other terminations, including those listed on page 14 of the Ordinance, must be preceded by attempts at progressive discipline.

D. Page 15 of the Ordinance contains a section entitled Disciplinary Action, which lists the types of disciplinary actions which an employer can impose upon an employee. The section on dismissal procedures in part states,

> "Dismissal should be considered only after all attempts at progressive discipline (e.g. verbal counseling, written counseling, suspension, special review period, etc.) have failed. The exceptions to progressive discipline are incidents of severe misconduct. No dismissal shall be made unless and until the employee is given a pre-dismissal hearing."

E. Sheriff Jordan did not allege and did not prove that Captain Workman's action constituted severe misconduct.

F. Some of Captain Workman's comments were vulgar, sexist, inconsiderate and inappropriate in the workplace, but did not contain sexual innuendos or seek sexual favors, as are normally required by case law to prove a case under Title VII of the Civil Rights Act of 1964 or to prove a violation of the Federal Equal Employment Opportunity Commissions' guidelines on discrimination because of sex, 29 C.F.R. Section 1604.11. The Statute has been cited by both parties and the C.F.R. regulation contains the same language as the County Personnel Policy.

G. Captain Workman's actions did not rise to the level of sexual harassment by any definition

available to the Hearing Officer. Captain Workman's actions did not include unwelcome sexual advances, requests for sexual favors or constitute verbal or physical behavior of a sexual nature which has the purpose or effect of unreasonably interfering with an individual's work performance or create an intimating, hostile or offensive work environment. Any effect Captain Workman's actions may have had on any female employee's work performance was not substantial and did not of itself, create an intimating, hostile, or offensive work environment. His actions, although they may have been inappropriate, were not inconsistent with the actions and telling of stories or jokes containing sexual innuendos of numerous other employees of the agency, which apparently are tolerated by the agency, as there is no evidence in the record to reflect any efforts made to curb such activity.

H. The Sheriff argues that because Workman was a high ranking official, he either knew or should have known that he was not being sufficiently supportive of the Sheriff and that he was engaging in improper conduct without being told that he was engaging in improper conduct. This argument, under certain circumstances may have merit, however, Ordinance No. 118-G, specifically the section involving exempt positions on page 13, does exempt certain employees and could have easily exempted Captains in the Sheriff's Department. Since the Ordinance specifically does exempt certain employees and does not exempt the remainder of the employees, the Ordinance must be followed as closely as possible in terminating employees and that includes

complying with the Ordinance's requirements of progressive discipline.

I. Captain Workman's evaluations throughout his fourteen year career with the Sheriff's office have always rated him as meeting or exceeding the standard, except during one evaluation period approximately two and one-half years prior to the termination. The activity that caused the termination was not reasonably related to the activity which resulted in the poor evaluation in the period covering the first half of 1987. (Note: Text may be missing from Hearing Officer's Findings of Fact, Conclusions and Decision ) he [sic] was not managing his department in accordance with the Sheriff's desires, but he was never given specific instructions on how to modify his behavior and how to come into compliance with the policies or management style of the Sheriff.

THE HEARING OFFICER THEREFORE, makes the following conclusions:

A. The information provided by Captain Branham, to the Sheriff and the personnel department, was insufficient to sustain a charge of sexual harassment.

B. Given the rather common practice of telling jokes involving sexual innuendos, the use of terms such as "bitch" or "bimbo" or other vulgar language within the agency and with no effort to halt such activity, the actions of Captain Workman could not be considered deliberate, offensive language or

conduct toward the public or fellow employees, which would warrant termination.

C. Ordinance No. 118-G, except in cases of the commission of a crime, extreme misconduct, and sexual harassment, states that an employee must be given notice of his deficiencies or improper actions through progressive forms of discipline, prior to being terminated.

D. The Sheriff, through the Weld County Commissioners and Ordinance No. 118-G, has established policies and procedures for terminating an employee, specifically the imposition of progressive discipline prior to terminating an employee and the Sheriff did not follow those policies in regard to Captain Workman's termination.

E. An employee, charged with incompetence or inefficiency, must be specifically advised of the action or inaction which his employer believes reflect incompetence or are inefficient and the employee must be given an opportunity to correct his incompetent or inefficient acts when a policy such as Ordinance 118-G is in effect. Captain Workman was never advised either orally or in writing that any act or inaction on his part could be considered incompetent or inefficient. Captain Workman, to the contrary, was given good evaluations by the agency throughout his fourteen year career with the Sheriff's office, except during one six month period. In addition, when an employee must be given notice of his poor performance, it must be given in a timely manner, so that the employee can correct his actions

prior to being terminated. A discipline imposed two and one-half years prior to a termination, cannot be used as the basis for a termination, particularly when that discipline was not reasonably related to the acts causing the termination.

F. The first paragraph of the dismissal procedures of Ordinance 118-G states, "Dismissal should be considered only after all attempts at progressive discipline, (e.g. verbal counselling, written counselling, suspension, special review period, etc.) have failed." This requires that except in cases of severe misconduct, conviction of a crime and sexual harassment, an employee must before termination, receive at least two forms of progressive discipline (because attempts is plural) prior to termination. Because of the language of the Ordinance, it may require that all forms of discipline be used prior to termination, specifically verbal counselling, written counselling, suspension with our without pay, special review period and demotion, must have been attempted and failed prior to the termination of an employee.

G. Since the charges against Captain Workman for sexual harassment cannot be sustained and since he is not charged with severe misconduct and even if he were charged with severe misconduct, it could not be sustained and since he is not charged with conviction of a crime, he cannot be terminated until at least some attempts at progressive discipline have been made and failed.

IT IS THEREFORE THE DECISION OF THE HEARING OFFICER THAT; the grievance is sustained and the termination is reversed.

DATED this 30th day of March, 1990.

Don J. Hoff, Hearing Officer

## APPENDIX "B"

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**§ 24-10-106. Immunity and partial waiver.** (1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant except as provided otherwise in this section. Sovereign immunity is waived by a public entity in an action for injuries resulting from:

(a) The operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of his employment, except emergency vehicles operating within the provisions of section 42-4-106(2) and (3), C.R.S.:

(b) The operation of any public hospital, correctional facility, as defined in section 17-1-102, C.R.S., or jail by such public entity;

(c) A dangerous condition of any public building;

(d) A dangerous condition of a public highway, road, or street which physically interferes

with the movement of traffic on the paved portion, if paved, or on the portion customarily used for travel by motor vehicles, if unpaved, of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any highway which is a part of the federal secondary highway system, or of any highway which is a part of the state highway system on that portion of such highway, road, street, or sidewalk which was designed and intended for public travel or parking thereon. As used in this section, the phrase "physically interferes with the movement of traffic" shall not include traffic signs, signals, or markings, or the lack thereof, but shall include the failure to repair a stop sign or a yield sign which reassigned the right-of-way or the failure to repair a traffic control signal on which conflicting directions are displayed, if such failure constituted a dangerous condition as defined in section 24-10-103(1).

(e) A dangerous condition of any public hospital, jail, public facility located in any park or recreation area maintained by a public entity or public water, gas, sanitation, electrical, power, or swimming facility. Nothing in this paragraph (e) or in paragraph (d) of this subsection (1) shall be construed to prevent a public entity from asserting sovereign immunity for an injury caused by the natural condition of any unimproved property, whether or not such property is located in a park or recreation area or on a highway, road, or street right-of-way.

(f) The operation and maintenance of any public water facility, gas facility, sanitation facility,

electrical facility, power facility, or swimming facility by such public entity.

(2) Nothing in this section or in section 24-10-104 shall be construed to constitute a waiver of sovereign immunity where the injury arises from the act, or failure to act, of a public employee where the act is the type of act for which the public employee would be or heretofore has been personally immune from liability.

(3) In addition to the immunity provided in subsection (1) of this section, a public entity shall also have the same immunity as a public employee for any act or failure to act for which a public employee would be or heretofore has been personally immune from liability.

(4) No rule of law imposing absolute or strict liability shall be applied in any action against a public entity or a public employee for an injury resulting from a dangerous condition of, or the operation and maintenance of, a public water facility or public sanitation facility. No liability shall be imposed in any such action unless negligence is proven.

**§ 24-50.5-101. Legislative declaration.** The general assembly hereby declares that the people of Colorado are entitled to information about the workings of state government in order to reduce the waste and mismanagement of public funds, to reduce abuses in government authority, and to prevent illegal and unethical practices. The general assembly further declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to

provide sound management of governmental affairs. To help achieve these objectives, the general assembly declares that state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official.

**§ 24-50.5-102. Definitions.** As used in this article, unless the context otherwise requires:

(1) "Disciplinary action" means any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty.

(2) "Disclosure of information" means the written provision of evidence to any person, or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency.

(3) "Employee" means any person employed by a state agency.

(4) "State agency" means any board, commission, department, division, section, or other agency of the executive, legislative, or judicial branch

of state government.

(5) "Supervisor" means any board, commission, department head, division head, or other person who supervises or is responsible for the work of one or more employees.

**§24-50.5-103. Retaliation prohibited.** (1) Except as provided in subsection (2) of this section, no appointing authority or supervisor shall initiate or administer any disciplinary action against an employee on account of the employee's disclosure of information. This section shall not apply to:

(a) An employee who discloses information that he knows to be false or who discloses information with disregard for the truth or falsity thereof;

(b) An employee who discloses information from public records which are closed to public inspection pursuant to section 24-72-204;

(c) An employee who discloses information which is confidential under any other provision of law.

(2) It shall be the obligation of an employee who wishes to disclose information under the protection of this article to make a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure.